

PROPOSALS FOR BROADENING THE THRUST AND SIGNIFICANCE
OF THE NECLC LAWSUITS CHALLENGING THE LEGALITY OF THE VIETNAM WAR

Rapidly increasing disaffection with the war (combined with growing frustration at the seeming inability of public opinion to affect the government's war policies, general shame and repugnance at the atrocities revealed by the Calley trial and by the increasingly vocal Vietnam Veterans against the War, growing anger in Congress at the results of Presidential usurpation of Congress's constitutional war-making power, the perfidious and scofflaw attitudes of our national leaders disclosed in the Pentagon (McNamara) Papers -- these have made a whole new situation which provides unique possibilities for legal challenges to the war. As Newsweek remarks, "What was really at play in the disclosure of the McNamara papers -- indeed in their very existence -- was the quickening impulse somehow to settle accounts for a war that is now running down to its bitter ending." The new NECLC suits are extremely timely.

However, if these suits are conducted in such a way as to give the impression, either to the courts or the general public, that the thrust of our challenge is focused mainly on the absence of a congressional declaration of war and the fact that the war is being fought by illegal (atrocious) methods, then (to express it in the mildest possible terms!) I believe that we would not be making the most of this unique opportunity, either in terms of public education regarding the basic causes of this debacle, or in terms of helping to build legal and judicial bulwarks against future Vietnams. In its resistance to McCarthyism, ECLC took a courageous position "ahead of the herd". Now "the herd" is concerned over My Lai and the non-declaration of war. I believe that NECLC owes it to its own glorious tradition to take a more courageous and far-sighted position in these lawsuits.

Therefore, I would like to suggest 5 proposals which I believe would help these suits to realize more fully their great potential:

The Proposals

- 1) To invoke, as a major thrust of the legal argument, the U.S. violations of the U.N. Charter, articles 2(4) and 1(2) (see attached memo on "The Illegality of U.S. Intervention in Vietnam: Violations of the Key Provisions of the U.N. Charter"), and Principle VI-A of the Nuremberg Charter regarding "Crimes against Peace" (see attached copy);
- 2) Plaintiffs to include not only taxpayers (as such), but anyone who has suffered actual or threatened loss or damage to his person or property as a result of this illegal war -- e.g., particularly, disabled Vietnam Veterans (members of Vietnam Veterans Against the War would undoubtedly be enthusiastic about this); wives or relatives of soldiers killed in Vietnam, draftees now in service in Vietnam or about to be sent there; men who have been imprisoned for draft refusal on grounds of the illegality of the war (especially where courts have refused to even hear this defense!); men who have become heroin addicts in Vietnam (because of the nature of the illegal war they are forced to fight) or their wives or relatives; veterans who have suffered mental breakdowns because of the nature of the war they were forced to fight, etc.
- 3) Make active efforts to add as many individual plaintiffs as possible (i.e. avoid having it essentially a class suit), on the grounds that (a) ~~each~~ one additional plaintiff would contribute much more in financial support (even with a \$25 filing fee) than the additional cost of adding his name -- as in the mass-signature newspaper ads;
(b) direct personal participation in the suit will tend to increase interest in the case, and tend to make each plaintiff a "missionary" to sign up others;
(c) to add the prestige of as many "big name" plaintiffs as possible.
- 4) Make an active effort to get other organizations to become plaintiffs, on behalf of their members (without, however, diluting NECLC control of the case.)

5) Since NECLC is primarily a legal-action, rather than an educational and agitational organization, consider carefully the possibility of helping to set up a separate ad-hoc organization (with a meaningful name something like: Committee to Reestablish American National Honor and International Legality) which will take main responsibility for the organizational, educational and public relations aspects of the case, as well as the desirable coordination with other organizations doing related work and those which have related cases in the courts. Prof. Mark Sacharoff (of Temple U.), who authored the war crimes bibliography which provided the basis for Neil Sheehan's review article in the 3/28 NYT Book Review Sect., is already connected with a small group, The Education-Action Conference on U.S. Crimes of War, which includes a number of very top-flight individuals in the field (Falk, Lifton, Fernandez, Peter Weiss, etc.), and which might shift its emphasis from "war crimes" to "crimes against the peace", or, alternatively, provide the nucleus for a group with the latter focus.

"Political" arguments in favor of the U.N. Charter/
Crimes Against the Peace focus of the suits

1) The "cold war" has been the greatest threat to American civil liberties in recent history. (It has also been a very important factor in limiting civil liberties in socialist countries!) Thus, an effort to use judicial weapons to fight the cold war is fully consistent with the basic purpose of NECLC.

2) It has been crystal clear to all thinking men since Hiroshima that mankind must outlaw war if we are to survive (and to create a political-social-psychological environment in which survival is really worthwhile!).

3) Essentially, "law" is merely the codification and crystallization of the rules governing human relationships. Good law -- law based on equity and a democratic social structure--is essentially the application of basic moral principles to concrete situations and problems. Thus, the much-discussed dichotomy between the "morality" and the "legality" of the Vietnam war is a false dichotomy.

the based on ignorance of/applicable higher (more basic) law of the U.N. Charter, and the U.S. Constitution (which are predominantly "good law"), and undue emphasis on such subsidiary laws as the Selective Service act which the individual must violate in order to place his conduct in consonance with the higher law.

4) The United Nations Charter sets forth principles of international behavior which would go a long way towards "outlawing war" -- if they were obeyed. However, the United Nations has no effective means of enforcing these rules, or even for requiring adjudication, when they are ignored by great powers. But the law is there, and could be made effective if the U.S. were to change its scofflaw attitude.

5) Members of the U.S. governing "inner circle" -- including either Gen. Ridgway or Gen. Gavin (I forget which) ⁶² have stated publicly that those making U.S. policy in Vietnam felt that international law was simply irrelevant -- i.e., bluntly speaking, that the U.S. is "above the law", and that the only law they respect is the law of the jungle: might makes right. In Newsweek's article on the Pentagon Papers, they note that "In common with some other American officials, moreover, Rostow could hardly conceive of a problem that could not be solved by the resolute application of raw American power."

This attitude can be changed only when the American people understand the significance of this law for our own national security -- and national honor.

6) The "rule of law" is a fragile thing and breaks down easily when violations are permitted. History may well charge the U.S. with major responsibility for the recent massacres in East Pakistan (Bengal), because that is the kind of thing which could have been stopped immediately if the U.N. had not been discredited and immobilized by U.S. cold war policies, and if the U.S. did not have so many war crimes on our own hands that we cannot ^{demand} action against others guilty of the same policies.

7) When China achieves atomic parity -- and perhaps even West Germany and Japan, and who knows who else? -- we may realize that we need the United Nations and international law to protect our own national security. But by then it may be too late.

8) In the U.S., public opinion (in terms of both intellectual understanding and psychological acceptance) must at least keep pace with national policy reform, but it may (or rather, should) actually precede and determine national policy. This is the great challenge to those who have the understanding and insight to see things clearly.

9) Recent public concern with "war crimes" (atrocities) provides a fertile situation for public education. But the required insights regarding the basic causes of the war and ^{of} these atrocities will not automatically follow (or at least not soon enough) from the present disillusionment -- it must be guided by those who have been fortunate enough to understand clearly that the atrocities are not some aberration of a few people, but an inevitable, inherent, result of a war whose basic objectives violate the U.N. Charter and other international law which was formulated precisely to prevent just such tragedies. People need to recognize that the U.S. is now in the same position as the scofflaw motorist who runs through red lights and stop signs and passes on curves and gets smashed up in a collision resulting directly from a violation of the law.

Newsweek quotes "one of the principal players in the drama just now come to judgment": "'Everyone is missing the point. The point is that these were honest, conscientious men trying to do a job as well as they could, and we have to try to understand it so it doesn't happen again.' Perhaps one of the keys to understanding was that if they were honest men, they were limited men as well. They served the orthodoxies of their era and waged their war accordingly. Their failure was that while they did a great deal of soul-searching, they did not finally question those orthodoxies...The impulse to judgment is strong...yet

unless that impulse is tempered by reason, the time of accounting may prove a tragic aftermath to a tragic war."

The "orthodoxies" referred to are, of course, /the "Big Lies" of the cold war which were foisted on the American people in the years following World War II, and which underlay American public support for the Vietnam War -- just as similar "Big Lies" promulgated by Adolf Hitler underlay German public support for Nazi aggressions. It is one of the main theses of these proposals that one of the most effective ways of scotching these "Big Lies" is to bring about a renewed public understanding of the purposes and nature of the United Nations and the world law which it stands for.

10) One not-so- incidental function of this basic approach is that it takes the primary burden of responsibility for the atrocities in Vietnam off the shoulders of the Military; and places it on the shoulders of those civilian leaders who started the war --- the kind of war whose very nature inevitably leads to atrocities, no matter how ardently the military leaders might have tried to prevent them. Leaving the military such a psychological "way out" may well help to prevent attempts at a military coup or other reactions such as France and Germany have experienced.

Judicial arguments supporting the proposed basic thrust of these suits, and countering the argument that it has "no legal merit" or "no legal future"

1) To say that American intervention in Vietnam is a non-justiciable "political question" which our courts cannot touch strikes a serious blow at the very heart of the American political system. For it implies that "the rule of law" does not apply to this country's foreign policies, or to the government's relations to the citizens of this country in areas related to foreign policy! I believe it is important to force the courts to take a stand on this issue before our illegal foreign policies lead to the "necessity" for taking illegal actions against the

American people -- before a scofflaw presidential attitude towards international law leads to a scofflaw attitude towards the Bill of Rights.

2) Foreign policy is of course "political" because it is established by political processes. But to a layman, the difference between a political issue and a legal issue would seem to be this: a legal issue concerns whether an action or policy corresponds with existing law, whereas a political issue would be one where there is a choice between different policies all of which are in themselves fully constitutional. To argue anything else is to say that "political" decisions (however they may be defined) are above the law. This is dangerous doctrine!

3) It took the Supreme Court about 90 years to arrive at the conclusion that "separate but equal" facilities violated the 14th Amendment. It is high time that the court recognized that the "due process clause" of the 5th amendment means that the President cannot deprive citizens of their "life, liberty and property" in an illegal war -- that "due process of law", ^{a/so} applies to the constitutional procedures under which this country can be led into war.

4) International jurists are fully agreed that the Nuremberg Principles do apply to U.S. conduct in Vietnam. See attached excerpts from the NET-BBC-PBS panel, "Nuremberg and Vietnam: Who is Guilty?" Although the Nuremberg Charter is an "executive agreement" rather than a fully ratified treaty, a good argument can be made for its having the same force as a treaty. (a) A large proportion of the international agreements made by the U.S. government in the last 25 years have been of this type, and I believe there are judicial precedents for giving them the force of treaties. (b) At any rate, the Executive Branch cannot have it both ways: it claims that our involvement in Vietnam and other places are based on "commitments" made by the U.S. Government to help these countries, (even when real and not imaginary!) and most of these commitments ¹ have been of the executive type, rather than duly ratified treaties. If executive agreements have sufficient force to obligate

us to make war, we should be equally obligated to honor those which require us to refrain from making war under specified conditions. (This is not to say that it would not be very desirable to put stricter limits on the scope of executive agreements generally, so as to return to Congress more of the power originally intended for it in the Constitution.)

In any case, the Nuremberg Charter is generally accepted as being "higher law" than the law of any individual state, and it should thus be included in any judicial challenge of the legality of U.S. policy in Vietnam.

5) Although it is generally considered to be highly unlikely that the Supreme Court will actually declare the Vietnam War to be illegal under the U.N. Charter within the immediate future, it is highly worthwhile raising this issue clearly, for these reasons:

a) It is probably equally unlikely that the Court would rule that U.S. policy in Vietnam does not violate the U.N. Charter and Nuremberg, for such a ruling would be so patently wrong in the eyes of the whole world that it would be embarrassing to the Court.

b) Therefore, the Court would be most likely to again dodge the issue by refusing to hear the case or to rule on the key issues. However, this would be the equivalent of a private citizen "taking the 5th amendment", and we have seen how difficult it is in such a case for the public to avoid the conclusion that such a course implies guilt.-- particularly after a highly-publicized long-drawn-out case in which the most damaging evidence is given full publicity (even though it may be technically inadmissible in court). Such an eventuality could not help but further undermine public support for the war and lay the basis for stronger resistance to "future Vietnams"

c) Any kind of negative ruling by the Court, after well-publicized evidence demonstrating the illegality of the war would help to lay the groundwork for some sort of non-judicial Commission of Inquiry.

6) Whether the judicial climate is "ripe" for this type of thrust is certainly a relevant question. But what makes the time ripe? And how can we tell for sure until we try it?

7) It is true that unfavorable court rulings may pose some difficulty to raising some of these issues again. However, the disclosures of the Pentagon Papers, and related disclosures from other key figures in that policy-making, should constitute "new evidence" which would warrant re-opening the issues at this time, as well as providing a more favorable climate of public opinion to give the courts greater courage.

Footnote: Although the international jurists referred to in (4) used most often the explicit term (as defined in the Nuremberg Principles) "crimes against the peace", rather than the hard-to-define concept of "aggression",

it is noteworthy that the U.S. itself, in meetings of the U.N. "Special Committee on Defining the Question of Aggression", co-sponsored a draft proposal defining aggression in terms which clearly apply to American intervention in Vietnam: "The term 'aggression' is applicable...to the use of force in international relations, overt or covert, direct or indirect, by a State against the territorial integrity or political independence of any other state, or in any manner inconsistent with the purposes of the United Nations." (Resolution 2330 (XXII)). See U.N. Charter, articles 2(4) and 1(2).

APPENDIX, LIST OF POTENTIAL PLAINTIFFS

For optimum effect, plaintiffs should include most peace organizations and representatives of as many as feasible of the different classes of citizens who have just cause for complaint (i.e. who are presently suffering judicially cognizable injury) as a result of illegal U.S. actions and policies in Vietnam and other cold-war efforts (actual or threatened risk of personal injury or death, loss of actual or potential civilian income, and/or loss of personal freedom)

- widows and other dependents of servicemen killed in Vietnam.
- servicemen disabled in combat in Vietnam.
- Vietnam veterans who have suffered mental breakdowns because of the atrocious nature of the war, particularly because of atrocities they were ordered to commit.
- Vietnam veterans who became heroin addicts (particularly those who turned to heroin because of depression over the atrocities of a war whose basic nature and causes they did not at the time understand.)
- draftees in service in Vietnam.
- draftees ordered to service in Vietnam.
- draftees now in training in the U.S. for service in Vietnam.
- youths ordered to report for induction.
- military personnel who volunteered for "peacetime" service on the assumption that combat duty would be required only for the defense of the U.S. and other legal purposes.
- conscientious deserters and others who have been given dishonorable discharges because they refused to fight in an illegal war.
- men "forced" to flee to Canada to avoid the choice of prison or fighting in an illegal war.
- draft objectors (pacifists and others) imprisoned for refusal to cooperate with the draft in one way or another.
- pacifists now engaged in required alternative service (loss of personal freedom and normal income).
- all (any) taxpayers, forced to support the illegal war financially.
- unemployed veterans and unemployed black youths: the depression was admittedly engineered by the Nixon administration to counter inflation; the inflation is almost unanimously recognized by economists as having been caused by the war (the war-induced distortions of the economy) and the way the war was financed (by deficits because Pres. Johnson feared to ask Congress for new taxes to finance an illegal war). Though the chain of causation of the present heavy unemployment may be indirect, it is nevertheless beyondut. serious question.

Congressmen, who are challenging the right of the Administration to make war in Vietnam without a proper declaration of war by Congress (separate test case now being planned).